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14. ABSTRACT We have seen major developments in Search and Rescue in the last thirty years. These issues affect the borders between the U.S. and Canada in the Great Lakes, as well as the Atlantic, Pacific, and Arctic regions. As the importance of national security continues to increase, a balance between concerns for sovereignty and concerns for lifesaving must be maintained. The U.S. and Canada must continue to uphold strong agreements and coordination of both policies and operations between each other and between aeronautical and maritime SAR services. We want those in distress to feel assured that their lives will not be jeopardized by bureaucratic red tape or a potential rescuer's hesitation to enter another country's territory to fulfill their duty to render assistance.					
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Search and Rescue Transits through Canadian Territorial Waters



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TABLE OF CONTENTS

I.	Introduction and Summary of Conclusions	2
II.	Factual Background	3
III.	Legal Discussion	
	A. The U.S. and Canada are both contracting states to the international organizations that develop the policy for SAR.....	5
	B. The U.S.'s National SAR Plan takes its guidance from international law and agreements.....	11
	C. SAR missions in Arctic passages	15
	D. Transportation of rescued personnel and liability for injuries	26
IV.	Conclusion	32

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Issue: What authorities exist for U.S. Coast Guard (USCG) vessels to transit through Canadian waters? What authorities are applicable for USCG vessels searching or making recoveries in Canadian waters? What coordination is required?

What authorities exist for USCG aircraft to overfly Canadian waters or land? Under what circumstances? What coordination is required? Can rescued individuals be transitioned back to the U.S.? What if the individual is injured by a USCG aircraft while in Canadian waters? Does the individual's citizenship matter?

B. Summary of Conclusions

1. The USCG may overfly Canadian territory in support of Search and Rescue (SAR) missions, entering and leaving without being subject to normal immigration or customs formalities. Additionally, USCG vessels may expedite entry into, operate in, and transit through Canadian waters to render aid.

Authorities permitting the USCG to operate in Canadian waters and airspace during SAR operations are well established. These include conventions, treaties, customary law, and U.S. Government directives.

2. The USCG will have the authority to operate in and conduct SAR missions in all Arctic passages open to U.S. shipping, regardless of whether they are determined to be international straits, archipelagic waters, or Canadian internal territorial waters.

3. Individuals rescued by USCG aircraft in Canadian territory may be transitioned back to the U.S. Also, payments made to individuals harmed in Canadian waters during a USCG SAR

operation may depend on the victim's citizenship, origination of the harm, and fault of the parties involved.

II. FACTUAL BACKGROUND

A. Characterization of Canada's territory

The United States and Canada, which share a common border that stretches 5,500 miles, cooperate extensively in matters involving the Great Lakes.¹ Since they signed the Boundary Waters Treaty in 1909,² the two countries have, through the International Joint Commission,³ worked together on protecting and maintaining border waterways, especially the Great Lakes.⁴

States have sovereign authority over the maritime areas up to twelve nautical miles off their coasts, known as their territorial sea.⁵ While states must grant foreign vessels a right of "innocent passage"⁶ through these waters, certain limitations may be placed upon these vessels. Internal waters, essentially on the landward side of a state's coastline, hold the status of fully sovereign territory that may be restricted to foreign entry.⁷

Canada's claim to sovereignty over the waters of the Arctic Archipelago has been expressed in a variety of ways; not always consistently, but always with the objective of ensuring

¹ CARL EK & IAN F. FERGUSON, CONG. RESEARCH SERV., 96-397, CANADA-U.S. RELATIONS (2010).

² Boundary Waters Treaty, U.S.-Can., Jan. 11, 1909, T.S. No. 548. This treaty between the United States and Canada provides mechanisms for resolving any dispute over any waters bordering the two countries. It covers the main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and Canada. It guarantees that any navigable waters be "free and open."

³ INT'L JOINT COMM'N, <http://www.ijc.org> (last visited Nov. 30, 2011). The commission was established by the Boundary Waters Treaty because each country recognized that they are affected by the other's actions in lake and river systems along the border. It is charged with helping the two countries cooperate to manage these waters wisely and to protect them for the benefit of today's citizens and future generations. Members, chosen by their respective heads of state, must act impartially as they try to prevent or resolve disputes, or assist the U.S. and Canadian governments in finding solutions to problems in boundary waters.

⁴ CANADA-U.S. RELATIONS, *supra* note 1.

⁵ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397. [hereinafter UNCLOS].

⁶ THE DICTIONARY OF MILITARY TERMS (U.S. DoD 2009). The right of all ships to engage in continuous and expeditious surface passage through the territorial sea and archipelagic waters of foreign coastal states in a manner not prejudicial to its peace, good order, or security.

⁷ UNCLOS, *supra* note 5.

Canadian control over the waters and passages through them. Additionally, there are four unsettled borders that will likely last into the distant future.

B. Modern day security concerns in the U.S. and Canada

Since September 11, 2001, the U.S. and Canada have taken a closer look at their border security. The two countries “share responsibility for the safety, security, and resilience of the United States and of Canada in an increasingly integrated and globalized world.”⁸ While respecting human rights and well-being, Canada and the U.S. intend to use strong cross-border engagement to extend the benefits of the countries’ close relationship.⁹

The U.S. and Canada must think about how to manage threats in such a way that this is kept in perspective with their overarching values, goals, and objectives as nations. “The biggest threat to this nation is not what terrorists can do to us, but what we can do to ourselves when we are spooked.”¹⁰

C. U.S. and Canadian SAR Coordination

The USCG’s SAR mission is to “prevent loss of life in every situation where [its] actions and performance *could possibly be brought to bear*.”¹¹ This falls in line with the primary duties to “develop, establish, maintain, and operate, with due regard to the requirements of national defense, aids to maritime navigation, icebreaking facilities, and rescue facilities for the

⁸ Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness, Declaration by President Obama and Prime Minister Harper of Canada (Feb. 4, 2011). The two countries intend to enhance their security and accelerate the legitimate flow of people, goods, and services to support economic competitiveness, job creation, and prosperity.

⁹ *Id.* Improved security will be developed from addressing threats earlier with a perimeter security approach, as well as implementing a comprehensive cross-border approach to strengthen the resilience of critical and infrastructure.

¹⁰ Stephen E. Flynn, *The Way to a Safe, Secure, & Efficient Canada-U.S. Border*, 34 CAN.-U.S. L.J. 171 (2008). This was part of the proceedings of the Canada-U.S. Law Institute conference on the world’s longest undefended border.

¹¹ U.S. COAST GUARD, OFFICE OF SEARCH AND RESCUE, <http://www.uscg.mil/hq/cg5/cg534.asp> (last visited Nov. 20, 2011). (emphasis added). [hereinafter CG-534]. Success requires seaworthy craft, proper equipment, necessary knowledge, training, and information to operate safely in the maritime environment, and to take the correct actions when faced with a distress situation.

promotion of safety on, under, and over the high seas and waters subject to the jurisdiction of the United States . . .”¹²

The USCG has specialized expertise, facilities, and equipment for responding to maritime distress and is the recognized SAR coordinator for all coastal and navigable waters of the U.S.¹³ It is responsible for operating the Rescue Coordination Centers (RCCs)¹⁴ overseeing their various aeronautical and maritime SAR Regions (SRRs).¹⁵ Within Canadian territory, SAR service is provided through one of three Joint Rescue Coordination Centers (JRCC).¹⁶ “The center controls all rescue units in their region through an extensive civil/military communications network.”¹⁷ JRCC Trenton in Ontario oversees the Canadian side of Great Lakes region.

III. LEGAL DISCUSSION

A. The U.S. and Canada are both contracting states to the international organizations that develop the policy for SAR.

The International Civil Aviation Organization (ICAO)¹⁸ and the International Maritime Organization (IMO)¹⁹ are both United Nations (UN) agencies established in the mid-twentieth

¹² U.S. Coast Guard Primary Duties, 63 Stat. 496 (1949) (current version 14 U.S.C. § 2 (2011)).

¹³ National Search and Rescue Plan of the United States, Interagency Agreement (Nat’l SAR Committee 2007). [hereinafter NSP]. The U.S. Air Force is responsible for SAR coordination for the inland continental U.S. and the U.S. Pacific Command covers the land in Alaska.

¹⁴ *Id.* RCCs are responsible for promoting efficient organization of SAR services and for coordinating the conduct of operations within an SRR (*see* note 15).

¹⁵ *Id.* SRRs are areas of defined dimensions within which SAR services are provided. Each are associated with an RCC.

¹⁶ TRANSPORT CANADA, SAR – 1.0 RESPONSIBLE AUTHORITY.

<http://www.tc.gc.ca/eng/civilaviation/publications/tp14371-sar-1-0-477.htm> (last visited Nov. 20, 2011). Transport Canada is responsible for regulating air, land, and marine transportation in Canada.

¹⁷ *Id.*

¹⁸ INT’L CIVIL AVIATION ORG., <http://www.icao.int> (last visited Nov. 20, 2011). [hereinafter ICAO]. The ICAO is a specialized agency of the UN with 191 members. The convention establishing the ICAO was adopted in Chicago in 1947 (*see* note 24) and went into effect in 1947. The ICAO codifies the principles and techniques of international air navigation and fosters the planning and development of international air transport to ensure safe and orderly growth. The ICAO Council adopts standards and recommended practices concerning air navigation, its infrastructure, flight inspection, prevention of unlawful interference, and facilitation of border-crossing procedures for international civil aviation.

century.²⁰ Membership in each organization consists of most of the world's countries, to include the U.S. and Canada.²¹ In the last thirty years, these organizations have lead in the development of an international SAR plan²² and a manual for states to provide such services.²³

The ICAO was established by the Convention on International Civil Aviation (Chicago Convention)²⁴ and came into being in 1947.²⁵ The organization is headquartered in Montreal and the 191 members include Canada and the U.S.²⁶ In Chapter II of the Chicago Convention, Flight Over Territory of Contracting States, Article 5 provides that:

Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission . . .²⁷

While Article 5 allows states to impose regulations, conditions, or limitations as it may consider desirable,²⁸ Annex 12 of the convention specifically addresses the topic of SAR.²⁹ In

¹⁹ INT'L MARITIME ORG., <http://www.imo.org> (last visited Nov. 20, 2011). [hereinafter IMO]. The IMO is a specialized agency of the UN with 169 member states and three associate members. The convention establishing the IMO was adopted in Geneva in 1948 to address the need for international standards to regulate shipping, and the first meeting took place in 1959. The IMO's primary purpose is to develop and maintain a comprehensive regulatory framework for shipping and its remit today includes safety, environmental concerns, legal matters, technical co-operation, maritime security and the efficiency of shipping.

²⁰ ICAO *supra* note 18 and IMO, *supra* note 19.

²¹ *Id.*

²² International Convention on Maritime Search and Rescue, 1979, as amended, 27 Apr. 1979, T.I.A.S. 11093, 1405 U.N.T.S. 97. [hereinafter SAR Convention].

²³ International Aeronautical and Maritime Search and Rescue Manual, Doc 9731-AN/958 (IMO/ICAO 2007). [hereinafter IAMSAR Manual].

²⁴ Convention on International Civil Aviation, 7 Dec. 1944, 61 Stat. 1180, 15 U.N.T.S. 295. [hereinafter Chicago Convention]. This convention establishing the ICAO (*see* note 18) is designated as ICAO Doc 7300/9. It establishes rules of airspace, aircraft registration and safety, and details the rights of the signatories in relation to air travel. The 9th edition is the most current and includes modifications from up through 2006. Search and Rescue guidance is covered in number 12 of the 18 annexes (*see* note 29) supporting the convention. They are amended regularly by the ICAO.

²⁵ ICAO, *supra* note 18.

²⁶ *Id.*

²⁷ Chicago Convention, *supra* note 24. Article 5, addressing the rights of non-scheduled flights over state's territory, applies to aircraft of states, other than scheduled international air services. Aircraft may be require to make a landing within the host state, follow prescribed routes, or obtain special permission for such flights.

²⁸ *Id.*

²⁹ Annex 12 to the Convention on International Civil Aviation, 7 Dec. 1944, 61 Stat. 1180, 15 U.N.T.S. 295. [hereinafter Annex 12]. Annex 12 contains five chapters that detail the organization and cooperative principles

the interest of rendering assistance to persons in distress, contracting states must “arrange for the establishment and prompt provision of search and rescue services within their territories . . .”³⁰

Chapter 3 of the annex, addressing cooperation between the Chicago Convention’s contracting states, imposes specific requirements:

Subject to such conditions as may be prescribed by its own authorities, a contracting state shall permit immediate entry into its territorial sea and air space search and rescue units of other states for the purpose of searching for the site of aircraft accidents and rescuing survivors of such accidents.³¹

States entering the territory of another are also required to “transmit a request, giving full details of the projected mission and the need for it . . . ,”³² Additionally, contracting states are “required to publish and disseminate all information needed for the expeditious entry into their territories of rescue units of other states.”³³

The IMO came into existence in 1958 so a permanent maritime body could manage international cooperation and treaties related to shipping, including safety.³⁴ The organization ensured important international conventions were kept up to date and was given the task of developing new conventions if needed.³⁵ In particular, the Maritime Safety Committee (MSC), the highest technical body of the organization consisting of all member states, is responsible for

appropriate to effective SAR operations, outlines required necessary preparatory measures, and sets forth proper operating procedures for SAR services. The incorporation of this set of internationally agreed upon standards and recommended practices was prompted by the need to rapidly locate and rescue survivors of aircraft accidents. It has been periodically updated to better align with guidance and direction in the IMO’s SAR Convention (*see* note 22) and the IAMSAR Manual (*see* note 23).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* Transmission requests are made to the RCC of the State concerned (*see* note 14) or to such other authority as has been designated by that state. Receipt of such a request shall be immediately acknowledged, and conditions must be given, if any, under which the projected mission may be undertaken.

³³ *Id.*

³⁴ 1948 Convention on the International Maritime Organization, Mar. 6, 1948, 9 U.S.T. 621, 289 U.N.T.S. 48. [hereinafter IMO Convention]. The IMO Convention, held in Geneva, established the mission and configuration of the IMO (*see* note 19). The convention was held to address matters concerning maritime safety, navigation, and the environment. This included the objective of removing discriminatory action and unnecessary restrictions by governments that were affecting shipping and international trade. It also establishes the responsibilities of the MSC (*see* note 36). There are currently 169 parties to the convention eight amendments have been adopted between 1964 and 1993.

³⁵ IMO, *supra* note 19.

matters affecting maritime safety.³⁶ The U.S. delegation to the MSC consists of USCG personnel.³⁷

One such treaty administered by the MSC is the International Convention for the Safety of Life at Sea (SOLAS Convention).³⁸ This 1974 convention concerns ship safety and includes the obligation to assist vessels in distress.³⁹ In addition to being enshrined in treaties such as the United Nations Convention on the Law of the Sea (UNCLOS),⁴⁰ the duty to render assistance in almost any circumstances is a well-established legal principle of the law of the sea.⁴¹ But, there was still no international system to specifically cover SAR operations. In some areas, there was a well-established organization able to provide assistance promptly and efficiently, while there was nothing at all in other areas.

The inconsistency of SAR services around the world was later addressed in the IMO's International Convention on Maritime Search and Rescue (SAR Convention).⁴² The convention

³⁶ INT'L MARITIME ORG., MARITIME SAFETY COMM., <http://www.imo.org/About/Pages/Structure.aspx> (last visited Nov. 20, 2011). [hereinafter MSC]. The MSC deals with any matters affecting maritime safety. The expanded MSC adopts amendments to conventions such as SOLAS and includes all Member States as well as those countries which are party to conventions even if they are not IMO Member States.

³⁷ U.S. COAST GUARD, IMO MARITIME SAFETY COMM., <http://www.uscg.mil/imo/msc/default.asp> (last visited Nov. 20, 2011). The USCG represents the U.S. on the MSC and the head of the delegation is the Assistant Commandant for Marine Safety, Security, and Stewardship. This in accordance with the NSP (*see* note 13).

³⁸ International Convention for the Safety of Life at Sea, 1974, as amended, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 278. [hereinafter SOLAS]. The SOLAS Convention in its successive forms is generally regarded as the most important of all international treaties concerning the safety of merchant ships. The first version was adopted in 1914, in response to the Titanic disaster, the second in 1929, the third in 1948, and the fourth in 1960. The current version was signed in 1974 and entered into force in 1980. It includes the tacit acceptance procedure, which provides that an amendment shall enter into force on a specified date unless, before that date, objections to the amendment are received from an agreed number of parties. As a result the 1974 Convention has been updated and amended over thirty times.

³⁹ *Id.*

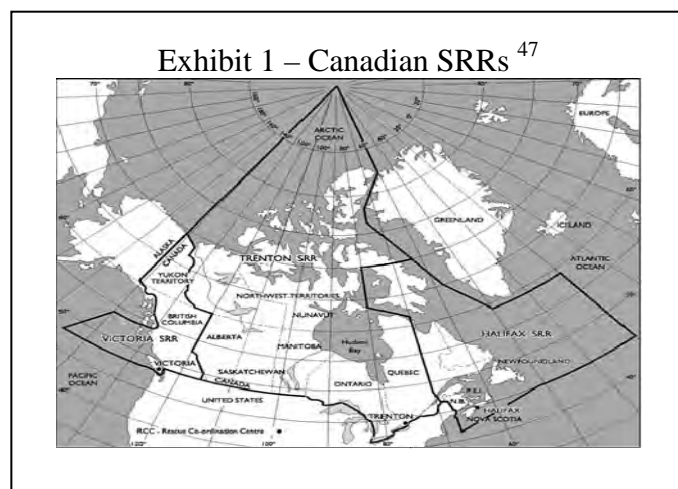
⁴⁰ UNCLOS, *supra* note 5. UNCLOS is the international agreement that resulted from the third UN Conference on the Law of the Sea, which was convened in New York and took place from 1973 through 1982. The convention defines the rights and responsibilities of nations in their use of the world's oceans. It came into force in 1994, replacing four 1958 treaties. To date, 161 countries and the European Community have joined in the Convention. While both the U.S. and Canada have signed it, only Canada had ratified it. Although the U.S. recognizes the UNCLOS as a codification of customary international law, there is still uncertainty among countries on this matter.

⁴¹ Melvin A. Eisenberg, *The Duty To Rescue in Contract Law*, 71 Fordham L. Rev. 647 (2002).

⁴² SAR Convention, *supra* note 22. The convention was adopted by an international conference held in Hamburg. It was designed to improve existing arrangements and provide a framework for carrying out SAR operations following accidents at sea. Although many countries have their own established, this was the first time international

was entered into force in 1985 with the purpose of developing an international SAR plan. This would help ensure the rescue of persons in distress at sea is coordinated by a SAR organization, no matter where the accident occurs.⁴³ Additionally, parties to the convention, such as the U.S. and Canada, are supposed to cooperate with each other when necessary.⁴⁴ Neighboring states have entered into SAR agreements involving the grouping of facilities, establishment of common procedures, training, liaison meetings, and the establishment of SRRs.⁴⁵ Canada, for instance, has three SRRs encompassing their Western, Central (including the Great Lakes), and Eastern territorial waters.⁴⁶

While the SAR Convention states that a party should take measures to expedite the entry of other parties' rescue units into its territorial waters,⁴⁸ the convention was also amended in the



1990s to facilitate increased cooperation and improved organization among its parties.⁴⁹ The amendment clarifies the responsibilities of governments, establishes a process to improve

procedures had been adopted. Because the convention imposes considerable obligations on parties, such as setting up the required shore installations, the ratification process of the convention has been slow.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* Following the adoption of the SAR Convention, IMO's Maritime Safety Committee divided the world's oceans into 13 SAR areas, in each of which the countries concerned have SRRs for which they are responsible. Provisional search and rescue plans for all of these areas were finalized at a conference held in Fremantle, Western Australia in September 1998.

⁴⁶ SAR – 1.0 RESPONSIBLE AUTHORITY, *supra* note 16. Each of the three regions is established in accordance with the provisions of ICAO Annex 12 (*see* note 29) and also includes extensive areas of adjoining international waters. See Exhibit 1.

⁴⁷ *Id.*

⁴⁸ SAR Convention, *supra* note 22.

⁴⁹ *Id.* The amendment was adopted in London in 1998 and entered into force on 2000. It addressed why so many of the world's coastal states had not accepted the 1979 SAR Convention's considerable obligations on parties, such as the cost of setting up the required shore installations. It particularly took into account lessons learned from SAR

international cooperative relationships, and puts a greater emphasis on regional approaches to the coordination of SAR activities.⁵⁰

Chapter 3 on Cooperation Between States says that “[u]nless otherwise agreed between the states concerned, a party should authorize, subject to applicable national laws, rules and regulations, immediate entry into or over its territorial sea or territory for rescue units of other parties solely for the purpose of search and rescue.”⁵¹ It also says that a state’s SAR activities should be coordinated on scene for the most effective results, which include the “closest practicable coordination between maritime and aeronautical services.”⁵²

Concurrently with the revision of the SAR Convention in the 1990s, the IMO and the ICAO jointly developed the International Aeronautical and Maritime Search and Rescue (IAMSAR) Manual.⁵³ This provides guidelines to all U.N. member states for a common aviation and maritime approach to organizing and providing SAR services. Amendments focusing on persons in distress at sea were adopted in 2004 and entered into force in 2006. Now, Chapter 1 says that states must undertake to provide SAR coordination and services. It then says “[n]eighboring States should seek practical means to balance [concerns for saving lives and concerns for sovereignty] for situations where entry of foreign SAR facilities into territorial waters or territory may be necessary or appropriate.”⁵⁴

operations, experiences of states that had implemented the convention, and the need to further harmonize the IMO and ICAO SAR provisions.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ IAMSAR Manual, *supra* note 23. This is the basic document for SAR used internationally. It is published in three volumes; Organization and Management, Mission Coordination, and Mobile Facilities. It is supplemented in the U.S. by the NSS (*see* note 60).

⁵⁴ *Id.* The language on cooperation appears under the Legal Basis for Services header. The international community expects these commits to be fulfilled by parties to the SOLAS Convention (*see* note 38), SAR Convention (*see* note 22), and Chicago Convention (*see* note 24).

The Appendix also provides a Sample Legislation Establishing a SAR Organization.⁵⁵

The language in sample Article 4 reads “[a]ll Government services concerned shall take measure to facilitate, as far as possible, the immediate and temporary entry of personnel, and their equipment, from other States who . . . are participating in search and rescue operations”⁵⁶ While this is in no way a binding law, it shows how important and established this concept is in international law.

B. The U.S.’s National SAR Plan takes its guidance from international law and agreements.

The National Search and Rescue Committee (NSARC)⁵⁷ is responsible for the provisions of the National SAR Plan of the U.S. (NSP),⁵⁸ which establishes the responsibilities for SAR among federal agencies.⁵⁹ The NSARC also publishes supplemental instructions to the IAMSAR Manual in the National SAR Supplement (NSS).⁶⁰ The guidance and procedures in these publications are derived from international law, the IAMSAR Manual, and other U.S. Government directives. They also make reference to various treaties and agreements as the original authority regarding entry into Canadian territory.

In the NSP, Paragraph 17 says “lines separating SRRs must normally be agreed by governments having neighboring SRRs when possible. SRRs will not be allowed to unduly

⁵⁵ *Id.* The sample legislation says that the government services concerned shall seek to implement, as appropriate, SAR recommendations and standards of the ICAO (*see* note 18) and/or the IMO (*see* note 19).

⁵⁶ *Id.* In addition to facilitating temporary entry by another state’s vessels or aircraft, the sample legislation says that a state’s organization(s) providing SAR shall be entitled to call for the collaboration and support of other government services.

⁵⁷ United States National Search and Rescue Committee Interagency Agreement (2007). [hereinafter NSARC]. The NSARC is a federal-level committee formed to coordinate SAR matters of interagency interest, to include oversight of the NSP (*see* note 13). It is sponsored and chaired by the USCG and has six member agencies to include the DHS and DoD.

⁵⁸ NSP, *supra* note 13. The NSP coordinates SAR services to meet domestic needs and international commitments, as well as assign SAR Coordinator responsibilities for the U.S. aeronautical and maritime SRRs.

⁵⁹ *Id.*

⁶⁰ United States National Search and Rescue Supplement to the International Aeronautical and Maritime Search and Rescue Manual (Nat’l SAR Committee 2000). [hereinafter NSS].

affect *or be affected by any political boundaries*.”⁶¹ Paragraph 30 says that agencies may conduct SAR missions outside U.S. territory consistent with their expertise, capabilities, and legal authority. “This is consistent with the principles of assisting persons in distress without regard to nationality or circumstances and of using all available resources for SAR.”⁶² It is also in the interest of the safety of U.S. citizens who are traveling abroad, such as U.S. citizens venturing into Canadian waters on the Great Lakes. Also, most transatlantic flights to and from the U.S. pass over Canadian territory.⁶³ Paragraph 31 specifically addresses entering another state’s territory:

In accordance with international law, United States SAR facilities, in a position to render timely and effective assistance, may enter into or over the territorial seas or archipelagic waters of another state for the purposes of rendering assistance to a person, ship, or aircraft whose position is reasonably well known, is in danger or distress due to perils of the seas, and requires emergency assistance.⁶⁴

The Guiding Principles make reference to customary international law and reduced response times.⁶⁵ Paragraph 49 states “[n]o provision of this Plan or any supporting plan is to be construed as an obstruction to prompt and effective action by any agency or individual to assist persons in distress.”⁶⁶ Paragraph 57 then says “[p]articipants will seek to keep political, economic, jurisdictional, or other such factors secondary when dealing with lifesaving matters.”⁶⁷

The NSP also makes it clear that policies on rendering assistance in the territory of another state balance concerns for saving lives, sovereignty, and national security. “Provisions

⁶¹ NSP, *supra* note 13 (emphasis added).

⁶² *Id.*

⁶³ NAV CANADA, <http://www.navcanada.ca/>, (last visited Nov. 20, 2011).

⁶⁴ NSP, *supra* note 13. Participants should also support another state’s SAR operations in territorial and international waters, consistent with their capabilities and legal authority.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* This is one of the Guiding Principles of the NSP. There is a duty to carry out obligations under customary international law and international instruments to which the U.S. is a party.

for territorial entry, as necessary, should be addressed in international civil SAR agreements; care should be taken to ensure that such agreements are compatible with national policies in this regard.”⁶⁸ Regarding situations where entry into Canadian territory for a SAR operation is necessary but not covered by any type of agreement or treaty, requests should be addressed to the nearest JRCC.⁶⁹ The JRCC must then reply and issue appropriate instructions.⁷⁰

The NSS,⁷¹ which is also published by the NSARC, gives specific U.S. SAR procedures and guidance to supplement the IAMSAR Manual.⁷² The USCG also published an addendum specific to its operations.⁷³ Some of the U.S.’s policies, rights, and responsibilities regarding Canada make reference to decades-old, but still important and valid, treaties between the countries.

In 1974, a SAR Agreement between the U.S. and Canada⁷⁴ was signed and entered into force for the purpose of providing coordinated SAR activities in maritime areas of mutual interest, to include waters on either side of the boundary lines. Paragraph C of the Agreement states “[t]he Canadian Forces and the United States Coast Guard shall provide for mutual co-

⁶⁸ *Id.* This is covered in paragraph 39 under the header of Support Outside U.S. SRRs. When looking at inquiries or proposals from other nations or organizations outside the U.S., care should be taken that the proper U.S. agencies are consulted.

⁶⁹ SAR – 1.0 RESPONSIBLE AUTHORITY, *supra* note 16.

⁷⁰ *Id.*

⁷¹ NSS, *supra* note 60. The NSS provides guidance to federal agencies concerning implementation of the NSP (*see* note 13) and provides specific additional national standards and guidance that build upon the baseline established by the IAMSAR Manual (*see* note 23). The NSS replaces the National SAR Manual.

⁷² *Id.*

⁷³ U.S. Coast Guard Addendum to the United States National Search and Rescue Supplement, COMDTINST M16130.2E (USCG 2009). [hereinafter CGADD]. The CGADD contains the policies and procedures applicable to USCG facilities within the U.S., territories, and possessions, and to Coast Guard SAR operations worldwide.

⁷⁴ Search and Rescue Agreement Between the United States of America and Canada, 15 Oct. 1974, T.I.A.S. 11963. [hereinafter 1974 SAR Agreement]. The 1974 SAR Agreement was signed in Ottawa and Washington D.C. by the Chief of Defense Staff, Canadian Forces and the Commandant of the USCG. It also confirms the maritime boundaries and coordinates to be used by the parties to demarcate SAR areas of mutual interest.

operation in the co-ordination and support of search and rescue operations.”⁷⁵ Paragraph E states:

Nothing contained herein shall prevent either signatory or the officials thereof from initiating search and rescue operations or from assuming co-ordination of a particular operation in the *maritime areas of the other* as described above when such action may be required or appropriate to meet the demands of the situation. Each signatory shall keep the other informed of activities of mutual interest in order that continuity in search and rescue operations may be ensured.⁷⁶

Before the 1974 SAR Treaty, The U.S. and Canada relied on two treaties separately addressing air and water SAR. In 1949, the Agreement Regarding Air Search and Rescue Operations⁷⁷ went into effect when the two countries recognized the necessity of ensuring adequate cooperation in air SAR along their common boundary. Under this agreement, “public aircraft of Canada or the United States which are engaged in emergency Air Search and Rescue operations, be permitted to enter or leave either country without being subject to the immigration or customs formalities normally required by the Government of either country . . .”⁷⁸

SAR operations along the boundary waters of Canada and the U.S. were addressed in the 1908 Treaty Regarding Reciprocal Rights for the United States and Canada in the Matters of Conveyance of Prisoners and Wrecking and Salvage.⁷⁹ Article II of this treaty provides for reciprocal privileges:

The High Contracting Parties agree that permits vessels and wrecking appliances, either from the United States or from Canada, to salvage property wrecked and to *render aid and assistance to any vessels wrecked, disabled, or in distress* in that

⁷⁵ *Id.*

⁷⁶ *Id.* (emphasis added).

⁷⁷ Agreement Regarding Air Search and Rescue Operations, Jan. 31, 1949, 63 Stat. 2328; T.I.A.S. 1882. [hereinafter Air SAR Agreement]. The bilateral agreement between the U.S. and Canada was effected by an exchange of notes signed in Washington D.C. between the Secretary of State and Canadian Ambassador. The U.S. gave Canada the same privileges it was granted in this agreement.

⁷⁸ *Id.* The RCC involved in the SAR must assume the responsibility for providing information on the intended operation to the nearest immigration or customs office to where the operation is to be conducted.

⁷⁹ Treaty Regarding Reciprocal Rights for the United States and Canada in the Matters of Conveyance of Prisoners and Wrecking and Salvage, May 18, 1908, 35 Stat. 2035; T.I.A.S. 502]. The Wrecking and Salvage Treaty was signed by the President Roosevelt and ratified by Great Britain on behalf of the Dominion of Canada.

portion of the St. Lawrence River through which the International Boundary line extends, and, on [the Great Lakes, boundary rivers and canals,] and on the shores and in the waters of the other country along the Atlantic and Pacific coasts *within a distance of thirty miles from the international boundary* on such Coasts.⁸⁰

The reciprocal privileges also “include all necessary towing incident thereto, and that nothing in the Customs, Coasting or other laws or regulations of either country shall restrict in any manner the salvaging operations of such vessels or wrecking appliances.”⁸¹

C. SAR missions in Canadian Arctic passages

As the Arctic polar ice cap recedes and more territory becomes accessible to shipping,⁸² new questions emerge regarding the lawfulness of USCG SAR transits through Canadian waters and airspace in the region. Because SAR will need to be provided in areas open to shipping, the subject was recently addressed by the U.S. and Canada in the 2011 Arctic SAR Agreement.⁸³ Canada has claimed full sovereignty over the waters of the Arctic Archipelago, in part because much of the area is covered by ice and a provision for ice-covered waters has been written into the UNCLOS.⁸⁴ But as the ice continues to melt and passages in the Canadian Arctic remain open for longer periods of time, the U.S. Government will continue the policy of asserting its maritime interests.⁸⁵

⁸⁰ *Id.* (emphasis added).

⁸¹ *Id.* After entering the other country’s territory, vessels are then required to make a report to the nearest custom house of the other country as soon as practicable.

⁸² MICHAEL BYERS, WHO OWNS THE ARCTIC? UNDERSTANDING SOVERIGNTY DISPUTES IN THE NORTH 77 (Douglas & McIntyre 2010). Average temperatures in the Arctic region are rising twice as fast as they are elsewhere in the world. The size of the summer polar ice cap has shrunk more than 20 percent in the last three decades.

⁸³ Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic, 12 May 2011. [hereinafter Arctic SAR Agreement].

⁸⁴ UNCLOS, *supra* note 5.

⁸⁵ National Security Presidential Directive on Arctic Region Security, HSPD-25 (Jan. 9, 2009). [hereinafter NSPD-66].

In the early 1970s, when it appeared that other states began to show an interest in finding a route through the Arctic,⁸⁶ Canada made the claim that its entire archipelago was *internal*, territorial waters; both through a border treaty with Greenland⁸⁷ and legislation to combat outsiders from exploiting the Canadian Arctic region.⁸⁸ According to Canada's Oceans Act,⁸⁹ last amended in 2005, they still maintain this viewpoint.⁹⁰ On the other hand, the U.S. and E.U. have maintained the position that passages through Canadian Arctic waters meet the legal definition of an international strait,⁹¹ and that all vessels should be free to transit without obtaining permission or paying a duty.⁹²

The U.S. recently reaffirmed this stance in 2009 with the National Security Presidential Directive on Arctic Region Policy (NSPD-66),⁹³ stating that preserving freedom of navigation in

⁸⁶ DONALD M. MCRAE & GORDON R. MUNRO, CANADIAN OCEANS POLICY: NATIONAL STRATEGIES AND THE NEW LAW OF THE SEA 166 (1989). In 1969, the icebreaking tanker SS Manhattan made a voyage through the NWP (*see* note 158) with the assistance of four additional icebreakers to test the feasibility of this possible new route. While the Manhattan succeeded, the route was deemed not to be cost effective, and the Alaska Pipeline was built instead.

⁸⁷ Agreement relating to the delimitation of the continental shelf between Greenland and Canada, Dec., 17, 1973, U.N.T.S. No. 13550]. This established a dividing line between Canada's arctic islands and Greenland. The parties agreed not explore or exploit the natural resources on each other's side of the established border. The agreement was registered in 1974 and remains in effect today.

⁸⁸ Arctic Waters Pollution Prevention Act, R.S. 1985, c. A-12 (Can.). [hereinafter AWPPA]. In response to the SS Manhattan (*see* note 86), the Canadian government enacted the AWPPA in 1970, asserting Canada's jurisdiction to regulate all shipping in zones up to 100 nautical miles off its Arctic coasts, therefore creating a 100 mile environmental protection zone around the Canadian archipelago.

⁸⁹ Oceans Act, S.C. 1996, c. 31 (Can.). The Parliament passed this act to affirm in Canadian domestic law Canada's sovereign rights, jurisdiction and responsibilities in the country's overall exclusive economic zone throughout the Arctic, Pacific, and Atlantic Oceans. The preamble describes this act as a precautionary approach to the conservation, management and exploitation of marine resources in order to protect these resources and preserve the marine environment.

⁹⁰ *Id.* Paragraph 6 states that Canada's internal waters are on the landward side of the baseline (*see* note 5) which stretches around the outer limit of its territory, and the only part of its territorial sea that are non-internal waters is the area within 12 nautical miles from the baseline.

⁹¹ Corfu Channel (U.K. v. Alb.), 1949 I.C.J. Rep. 4. (April 9). This is the primary source of law for the definition of an "international strait." The court rested on two critical findings: that the Corfu Strait connects two parts of the high seas (geographic criterion) and that it had been used for international navigation (functional criterion).

⁹² Rob Huebert, *Climate Change and Canadian Sovereignty in the Northwest Passage*, Occasional Paper No. 4, Calgary Papers in Military and Strategic Studies, 388 (2011). The U.S. and U.K., acting on behalf of the European Community, issued a diplomatic protest against Canadian efforts in 1985. The U.S. has challenged Canada's position over the years, most recently with NSPD-66 (*see* note 85).

⁹³ NSPD-66, *supra* note 85. The directive affirms the intention to preserve the global mobility of United States military and civilian vessels and aircraft throughout the Arctic region, and protect maritime commerce. It shall be implemented in a manner consistent with laws, treaties, and international agreements to which the U.S. is a party.

the region is a critical tenant of U.S. policy.⁹⁴ Section F on Maritime Transportation in the Arctic Region specifically mentions supporting SAR capabilities to facilitate safe, secure, and reliable navigation.⁹⁵ Interestingly, NSPD-66 also states that having a broad “Arctic Treaty,” along the lines of the well-established Antarctic Treaty,⁹⁶ would not be appropriate or necessary due to the geopolitical circumstances of the Arctic region.⁹⁷

Instead, the U.S. and Canada have dealt with Arctic matters bilaterally. In 1988, the two countries signed the Arctic Cooperation Agreement,⁹⁸ thus agreeing to disagree about the status of the Canada’s Arctic waters under applicable international law.⁹⁹ This agreement stems from a 1985 incident in which Canada formally sanctioned the U.S. for sending its icebreaker Polar Sea through the NWP without informing Canada or asking permission.¹⁰⁰ Now, because of the 1988 agreement, “[t]he Government of the United States pledges that all navigation by U.S. icebreakers within waters claimed by Canada to be internal will be undertaken with the consent of the Government of Canada.”¹⁰¹

⁹⁴ *Id.*

⁹⁵ *Id.* SAR is an important element to providing safe, secure, and environmentally sound maritime commerce in the Arctic.

⁹⁶ The Antarctic Treaty, Dec. 1, 1959, 402 U.N.T.S. 71. The treaty currently has 48 signatories and regulates international relations with respect to Antarctica and connecting ice sheets. It was signed in Washington DC in 1959 and entered into force in 1961 for the purpose of setting aside Antarctica as a scientific preserve, establishing freedom of scientific investigation, and banning military activity on the continent.

⁹⁷ NSPD-66, *supra* note 85.

⁹⁸ Canada and United States of America: Agreement on arctic cooperation, Jan. 11, 1988, U.N.T.S. No. 31529. [hereinafter Arctic Cooperation Agreement]. This bilateral agreement allows for practical cooperation regarding matters relating to the NWP (*see* note 158). It demonstrates a capacity to collaborate in functional terms without resolving legal differences.

⁹⁹ *Id.* Paragraph 4 states that “[n]othing in this agreement of cooperative ... affects the respective positions of the Governments of the United States and of Canada on the Law of the Sea in this or other maritime areas...”

¹⁰⁰ MCRAE & MUNRO, *supra* note 86. The Polar Sea incident and subsequent political skirmish was seen as a direct challenge to Canada's sovereignty in Arctic waters. However, when the U.S. notified Canada beforehand of the upcoming voyage, it claimed the mission was operational and without prejudice to the position of either country regarding the NWP.

¹⁰¹ Arctic Cooperation Agreement, *supra* note 98.

Canada has never denied consent to U.S. icebreakers, and an attempt to do so would lead to a dispute between the two governments.¹⁰² If ship traffic and trade routes do become established in Canadian Arctic waters, icebreakers will be key to helping maintain operations during colder months when ice is prevalent. The USCG is the only organization in the U.S. government with heavy icebreakers able to operate that far north.¹⁰³ Additionally, it would be irresponsible for organizations such as the USCG to keep passages open to shipping and not provide SAR.¹⁰⁴

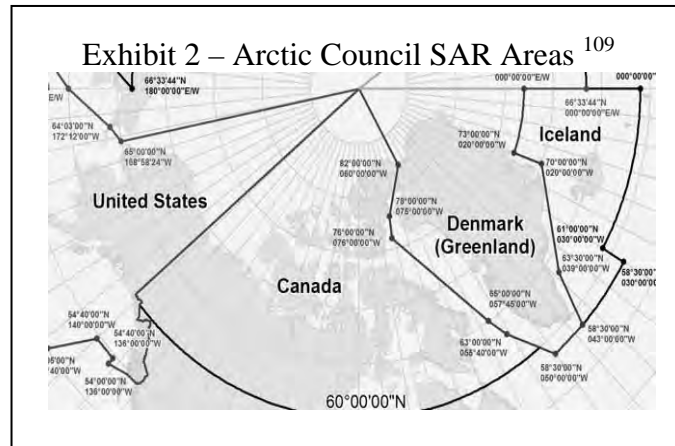
¹⁰² NSPD-66, *supra* note 85.

¹⁰³ U.S. COAST GUARD, <http://www.uscg.mil/default.asp> (last visited Nov. 20, 2011)]. The heavy icebreakers include the Polar Star (on reserve status), Polar Sea, and Healy. The Healy, commissioned in 2000, is the U.S.'s newest polar icebreaker. It is designed to break 4 ½ ft of ice continuously at three knots and can operate in temperatures as low as -50 degrees.

¹⁰⁴ Arctic SAR Agreement, *supra* note 83.

In 2011, parties to the Arctic Council,¹⁰⁵ including the U.S. and Canada, signed the Arctic SAR Agreement.¹⁰⁶ After fifteen years of existence,¹⁰⁷ and dealing with numerous issues

regarding the Arctic region, the council's very first legally binding treaty concerned the increasingly important subject of SAR. The treaty stipulates that states with territory in the Arctic will work together to provide a more robust SAR capability over vast



distances in a very harsh climate.¹⁰⁸ Regarding entry into another state's territorial waters or airspace, Article 8 states that parties must request permission to enter each other's territory for SAR purposes.¹¹⁰ Also, parties receiving the request shall advise as soon as possible whether entry is permitted and apply expeditious border crossing procedures.¹¹¹

Nevertheless, Article 9, Section 1 of the agreement says “[t]he Parties shall enhance cooperation among themselves in matters relevant to this Agreement”¹¹² and Article 3 requires

¹⁰⁵ ARCTIC COUNCIL, <http://www.arctic-council.org/index.php/en/> (last visited Nov. 20, 2011). The council is a high-level intergovernmental forum to promote cooperation, coordination, and interaction among the Arctic states. It was founded in 1996 (see note 107) and focuses on common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic. Members include Canada, Denmark (including Greenland and the Faroe Islands), Finland, Iceland, Norway, Russian Federation, Sweden, and the U.S. Observer status is also offered to non-member states.

¹⁰⁶ Arctic SAR Agreement, *supra* note 83. This agreement was signed in Nuuk, Greenland and is the first multilateral agreement made exclusively for the Arctic region. It deals with the coordination of SAR for aeronautical and maritime vessels and passengers over 13 million square miles.

¹⁰⁷ Declaration on the Establishment of the Arctic Council, 19 Sep. 1996. [hereinafter Ottawa Declaration]. The Ottawa Declaration formally established the Arctic Council, in part from a desire to promote cooperative activities and address issues requiring circumpolar cooperation; also to involve indigenous people, other Arctic inhabitants and their communities.

¹⁰⁸ Arctic SAR Agreement, *supra* note 83. See Exhibit 2.

¹⁰⁹ *Arctic Council – Search And Rescue Agreement Signed*, GCAPTAIN (Oct. 10, 2011).

¹¹⁰ Arctic SAR Agreement, *supra* note 83.

¹¹¹ *Id.*

¹¹² Arctic SAR Agreement, *supra* note 83.

an “adequate and effective SAR capability within its area.”¹¹³ This is also in line with UNCLOS 98(2), which states that the parties must provide adequate SAR and cooperate with states for that purpose.¹¹⁴ However, Canada’s Standing Senate Committee on National Security and Defense¹¹⁵ issued a report in 2011 that called for a more robust Arctic SAR capability.¹¹⁶ It noted that the need for SAR is on the rise and current response times are potentially too slow.¹¹⁷ It appears that a certain level of noncompliance by the Canadian government, such as too few resources or inadequate response times, would give the USCG authority to conduct SAR transits through Canada’s archipelagic waters and airspace.¹¹⁸

With increasing environmental and security concerns, it is understandable why Canada would want some measure of control over the NWP.¹¹⁹ The passage has a lot of similarities to the Strait of Magellan¹²⁰ at the tip of South America. While Chile and Argentina both claimed that the strait fell within their *internal* waters, they avoided a challenge to their claim by the maritime community by simply declaring the passage open to all vessels.¹²¹ Still, Canada had

¹¹³ *Id.*

¹¹⁴ UNCLOS, *supra* note 5.

¹¹⁵ PARLIAMENT OF CANADA: STAND. SEN. COM. ON NAT’L SEC. & DEF., http://www.parl.gc.ca/SenCommitteeBusiness/CommitteeHome.aspx?parl=37&ses=1&Language=E&comm_id=76 (last viewed Nov. 20, 2011). This Canadian Senate committee deals with matters relating to national defense and security generally, including veterans affairs.

¹¹⁶ Interim Report, Sovereignty & Security in Canada’s Arctic (Stand. Sen. Com. On Nat’l Sec. & Def. 2011) (Can.). This interim report by Canada’s Standing Senate Committee on National Security and Defense (*see* note 115) focuses on Canada’s Arctic sovereignty and security. It is not intended to be exhaustive on the subject, nor necessarily the committee’s final word.

¹¹⁷ *Id.*

¹¹⁸ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969). Article 60, addressing consequences of a breach, states that a specifically affected state may temporarily suspend its obligations under the treaty.

¹¹⁹ Brian Flemming, *Canada-U.S. Relations in the Arctic: A Neighbourly Proposal*, CDFAI (2008). Some are advocating the two countries negotiate framework that will accommodate key foreign policy goals and create regime to jointly manage the NWP.

¹²⁰ *Strait of Magellan*, NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/entry/Strait_of_Magellan (last visited Nov. 20, 2011). The strait, used by ships rounding South America between the Atlantic and Pacific Oceans, gives an inland passage protected from ocean storms and icebergs from the South Pole.

¹²¹ MICHAEL A. MORRIS, INTERNATIONAL STRAITS OF THE WORLD: THE STRAIT OF MAGELLAN 71 (1989). Free navigation guaranteed to the flags of all nations.

been able to point out that the waters separating most of the islands in their Arctic territory are frozen over most of the year, and therefore not navigable like the Strait of Magellan.

Furthermore, the native Inuit¹²² use this ice as an extension of the land, spending large amounts of time working, hunting, and even living on the ice.¹²³

The status of Canada's occupied ice is reflected in the UNCLOS,¹²⁴ the "most overarching, international legal regime put forth to govern the use, restrictions, and sovereignty of the world's waters."¹²⁵ Even though Canada ratified the UNCLOS in 2003, it was entered into force in 1994.¹²⁶ Clause 234, known as the "Canada Clause," is seen as a loophole applying to ice-covered areas.

Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance.¹²⁷

This would not allow Canada to deny passage, but it appears Canada would be allowed to enforce their domestic legislation for high standards of environmental protection.¹²⁸ The U.S., which has signed the UNCLOS but has not ratified it for political reasons,¹²⁹ does not accept the argument that ice cover should make a difference in the status of a strait.¹³⁰

¹²² *Inuit*, NEW WORLD ENCYCLOPEDIA, <http://www.newworldencyclopedia.org/entry/Inuit> (last visited Nov. 20, 2011). The Inuit are a group of culturally similar indigenous peoples living throughout most of the Canadian Arctic and subarctic. They have traditionally relied on fish, marine mammals, and land animals for survival.

¹²³ *Id.*

¹²⁴ UNCLOS, *supra* note 5. It published conventions such as the 12-mile territorial waters limit and the 200-mile economic exclusion zone for all coastal nations. UNCLOS brought relief from conflicting rules, and navigation through narrow straits became based on agreed-to, international legal principles.

¹²⁵ TARN M. ABELL, ARCTIC SECURITY IN A WARMING WORLD (2010).

¹²⁶ UNCLOS, *supra* note 5.

¹²⁷ *Id.* Clause 34 was negotiated into the convention by Canada and predominately affects their territory in the Arctic.

¹²⁸ AWPPA, *supra* note 88.

¹²⁹ Steven Groves, *Accession to the U.N. Convention on the Law of the Sea Is Unnecessary to Secure U.S. Navigational Rights and Freedoms*, Background No. 2599 (2011). The UNCLOS has not been ratified by the U.S.

Because vessels are still not using the Arctic passages on any type of regular basis, there is no guarantee that the waters are going to be classified as an international strait by the international community, as addressed in Part III of the UNCLOS.¹³¹ Part IV defines how states with archipelagos may draw their territorial borders and the associated sovereignty of the internal waters and airspace.¹³² Although states have full sovereignty over their archipelagic waters and associated airspace, vessels of all states have the right of innocent passage through these waters.¹³³ Additionally, archipelagic states may designate suitable sea lanes and air routes for continuous and expeditious passage.¹³⁴

The UNCLOS definition of internal waters as “on the landward side”¹³⁵ may be open to interpretation.¹³⁶ However, Article 8 states that waters marked as *internal* in areas where they had not previously been considered as such must be open for the right of innocent passage.¹³⁷

Senate because enough lawmakers believe it contains flaws that will harm U.S. interests, such as regulation of seabed exploration. The United States has enjoyed freedom of the seas since its independence and will continue to do so even if it does not accede to UNCLOS because Enjoyment of the convention’s navigational provisions is not restricted to members.

¹³⁰ Corfu Channel Case, *supra* note 91. Ice on the water has never been a consideration in international law when determining whether the geographic and functional criteria have been met.

¹³¹ UNCLOS, *supra* note 5.

¹³² *Id.* Archipelagic waters are determined by drawing a baseline between the outermost points of the outermost islands, subject to these points being sufficiently close to one another. Sovereignty extends to the waters enclosed by these baselines, as well as to soil and the resources contained, regardless of depth or distance from the coast. Sovereignty also extends to the air space over these archipelagic waters.

¹³³ *Id.* The state may temporarily suspend specified areas from the innocent passage of foreign ships if it is essential for the protection of its security, done without discrimination, and has been duly published.

¹³⁴ *Id.* Sea lanes and air routes shall be defined by a series of continuous axis lines from the entry points of passage routes to the exit points.

¹³⁵ *Id.* Article 8 states that except as provided in Part IV, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the state.

¹³⁶ Fisheries Case (U.K. v. Nor.), 1951 I.C.J. (December 18). The ICJ accepted that states could draw straight baselines (*see* note 5) for the measurement of the territorial sea across areas of coast heavily indented with many off-lying islands. The court looked at the west coast of Norway, where the coastline is cut into by fjords and there are many small islands off the coast. Straight baselines could be drawn from the most seaward points on the mainland and island coasts, classifying significant areas of as internal waters over which the state would have full sovereignty.

¹³⁷ UNCLOS, *supra* note 5.

There is no evidence that the Canadian archipelago was ever considered to be internal waters before the first ships passed through the area and Canada started making claims in the 1970s.¹³⁸

Most countries believe the UNCLOS to be a codification of international customary law;¹³⁹ consistent conduct by states “consisting of customs that are accepted as legal requirements . . . part of a social and economic system that they are treated as if they were laws.”¹⁴⁰ According to the UN Charter,¹⁴¹ This is among the primary sources of international law used by UN.¹⁴² Article 92 states that “[the International Court of Justice (ICJ)],¹⁴³ whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply . . . international custom, as evidence of a general practice accepted as law.”¹⁴⁴ This directly incorporates Article 38(1)(b) of the ICJ Statute,¹⁴⁵ which officially acknowledges the existence of customary international law in addition to their established case law.¹⁴⁶

Under international law, the U.S. is constantly guarding its maritime interests all over the world. Military craft frequently conduct routine transits through international straits and

¹³⁸ MCRAE & MUNRO, *supra* note 86.

¹³⁹ NAVIGATIONAL RIGHTS AND FREEDOMS AND THE NEW LAW OF THE SEA 146 (Donald R. Rothwell & Sam Bateman eds., The Hague, Kluwer Law Int'l 2000).

¹⁴⁰ BLACK'S LAW DICTIONARY (9th ed. 2009).

¹⁴¹ U.N. Charter. The charter, signed in San Francisco in 1945, is the constituent treaty of the UN. It is also one of the constitutional texts of the ICJ (*see* note 143), which was brought into being by this charter.

¹⁴² *Id.*

¹⁴³ INT'L COURT OF JUSTICE, <http://www.icj-cij.org/homepage/index.php?lang=en> (last visited Nov. 20, 2011). [hereinafter ICJ]. The ICJ is the primary judicial organ of the UN. It was established in 1945 and is located in The Hague. The court's main functions are to settle legal disputes submitted to it by states and to provide advisory opinions on legal questions submitted to it by duly authorized international organs, agencies, and the UN General Assembly.

¹⁴⁴ U.N. Charter, *supra* note 141. The charter also deals with the ICJ (*see* note 143) in Article 7, paragraph 1; Article 36, paragraph 3; and Articles 92-96, which form Chapter XIV.

¹⁴⁵ Statute of the International Court of Justice. [hereinafter ICJ Statute]. The ICJ Statute is annexed to the UN Charter, of which it forms an integral part. The main object of the statute is to organize the composition and the functioning of the ICJ. It states that the court shall use international conventions, customs, general principles of law as recognized by civilized nations.

¹⁴⁶ Military and Paramilitary Activities in and against Nicaragua (Nicar. V. U.S.), 1986 I.C.J. (June 27). The ICJ held that the U.S. had violated international law by supporting the Contras in their rebellion against the Nicaraguan government. Here, the elements of an international customary law would be *Opinio Yuris* (past judge decisions or works of the most highly qualified publicists) which is then proven by existing state practices.

archipelagic sea lanes, both with surface ships and submarines.¹⁴⁷ In fact, submarines currently transit Canada's Arctic waters.¹⁴⁸ This is just one way the U.S. is ensuring that any positions it may assert regarding navigable waters will not be weakened due to dereliction. Additionally, since the UNCLOS came into force in 1994, the U.S. military has used the Freedom of Navigation Program¹⁴⁹ to simply navigate and overfly any territory in which another state has made claims that are considered excessive when measured against the convention.¹⁵⁰ Claims such as declaring a territorial sea is greater than twelve miles or requiring authorization to enter a territorial sea are considered to be an impairment to freedom that conflicts with maritime law and practice, and are therefore directly challenged.¹⁵¹ The U.S. Government takes the stance that unchallenged excessive claims may, in time, become valid through acquiescence.¹⁵²

¹⁴⁷ Groves, *supra* note 129.

¹⁴⁸ *Canada's new leader takes on U.S. over Arctic*, ASSOCIATED PRESS (Jan. 27, 2006). The U.S. has sent submarines through Canadian Arctic waters without notification and the Canadian government has generally turned a blind eye.

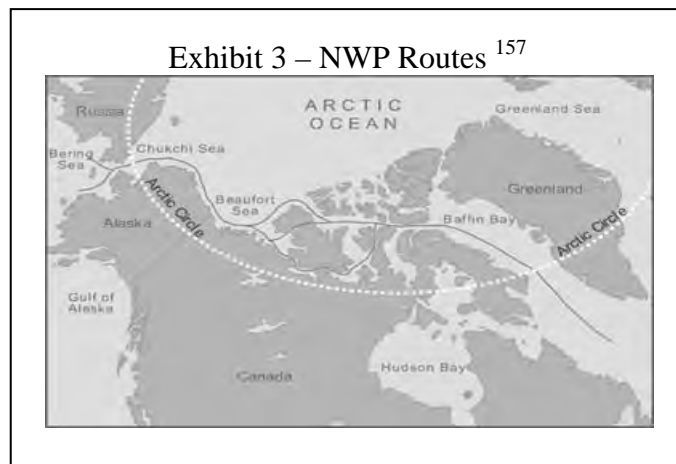
¹⁴⁹ Annual Report to the President and the Congress, Freedom of Navigation Program (DoD 1995). The program was established in 1979 and continues as an active tenet of national policy.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* Canada was not listed as one of the countries making a claim to trigger a Freedom of Navigation assertion by the U.S., likely because their claims do not directly conflict with UNCLOS and are covered by international agreements.

¹⁵² *Id.*

As recently as the summer of 2008, it appears that a Northwest Passage (NWP)¹⁵³ has opened, completely unimpeded by ice during part of the summer.¹⁵⁴ Many countries hope this will soon bring a new era of transits through the Arctic.¹⁵⁵ As the ice continues to stay melted for longer



periods in the summer, more ships from various countries will attempt to transit Canada's Arctic waters.¹⁵⁶ Despite taking steps to build a deep-water port, listening posts, and Arctic warfare training center,¹⁵⁸ critics say that Canada has not been doing enough to declare and enforce its jurisdiction and could lose a challenge in international courts.¹⁵⁹

¹⁵³ Suzanne Lalonde, *Increased Traffic through Canadian Arctic Waters: Canada's State of Readiness*, 38 R.J.T. 49 (2004). Global warming is thawing Canada's Arctic waters, making navigation more feasible through the Northwest Passage (NWP), which is a series of connected channels between large islands making up the Canadian archipelago. Ships will have to pass through Canadian territorial waters due to the 12 mile boundary established by the UNCLOS (see note 5).

¹⁵⁴ *1st commercial ship sails through Northwest Passage*, CBC NEWS, Nov. 28, 2008. The ship was delivering supplies to a western Canadian province. The company reported planning to ship supplies along the same route the following year as the NWP becomes a viable option for commercial shipping routes. Companies will be able to travel shorter distances and save a lot of time and fuel costs.

¹⁵⁵ *Id.*

¹⁵⁶ Lalonde, *supra* note 153. In 1999, a Russian ship pulled a massive floating dry dock all the way through the passage en route to the Bahamas, marking its the first foreign industrial use. See Exhibit 3.

¹⁵⁷ Geology.com, *Global Warming is Opening Canada's Arctic*. <http://geology.com/articles/northwest-passage.shtml> (last visited Nov. 20, 2011).

¹⁵⁸ *Battle for the Arctic Heats Up*, CBC NEWS, Aug. 20, 2010. During Canada's 2005 political campaign season, the conservative party promised to buy three huge, armed icebreakers to patrol the melting Arctic seas, build a deep-water port, and establish an Arctic warfare training center. The port and the training centre are being assembled, but the plan for icebreakers was scaled back years ago to smaller patrol ships.

¹⁵⁹ *Id.* While the NWP is not yet an established shipping route, it is unclear how many transits would have to be made for a court to find that it meets a "use" test.

D. Transportation of rescued personnel and liability for injuries

Recent SAR and SOLAS Convention amendments have addressed the transportation of rescued personnel. For those injured by the USCG while in Canadian territory, the financial liability of the U.S. and Canada is dictated in the 1951 NATO Status of Forces Agreement (SOFA).¹⁶⁰ Claims may also be brought in U.S. courts, but the USCG cannot be held liable unless it has initiated a rescue attempt and acts unreasonably.¹⁶¹

In 2004, the MSC adopted amendments to the SAR and SOLAS Conventions concerning the treatment of persons rescued at sea.¹⁶² This stemmed from the IMO's concern for the integrity of the global SAR system.¹⁶³ The Annex to the SAR Convention was amended to include new paragraphs in the third and fourth chapters covering Cooperation Between States and Operating Procedures.¹⁶⁴ The new language addresses assistance to the master in delivering persons rescued at sea to a place of safety.¹⁶⁵ This includes the use of RCCs to identify the most appropriate places for disembarking persons found in distress at sea.¹⁶⁶ While aircraft are not specifically mentioned, this should be applicable to USCG SAR aircraft because they are performing a maritime activity.

The SOLAS Convention was also revised to remain consistent with the SAR Convention. Chapter V on Safety of Navigation now has language mandating cooperation between states to

¹⁶⁰ Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, Apr. 4, 1949. [hereinafter NATO SOFA].

¹⁶¹ Paul A. Kettunen, *USCG Rescue Operations and the Good Samaritan Doctrine*, 76 MI BAR JNL. 696 (1997).

¹⁶² MSC, *supra* note 36. The amendments were developed in response to resolution A.920 on review of safety measures and procedures for the treatment of persons rescued at sea, adopted by the IMO's 22nd Assembly.

¹⁶³ IMO, *supra* note 19. The IMO's decision followed incidents highlighting concerns for the treatment of rescued persons, including asylum seekers, refugees, and stowaways.

¹⁶⁴ Maritime Safety Committee, Adoption of Amendments to the International Convention on Maritime Search and Rescue (SAR Convention), Annex 5, Res. MSC.155(78), 78/26/Add.1 (May 20, 2004). These changes were adopted in 2004 and entered into force in 2006.

¹⁶⁵ *Id.* This language was added in Chapter 3 of the Annex.

¹⁶⁶ *Id.* This language was added in Chapter 4 of the Annex.

assist a ship's master, and regulation on the master's discretion in delivering rescued persons to safety.¹⁶⁷ Regulation 33 adds the following:

The Contracting Government responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and *delivered to a place of safety, taking into account the particular circumstances of the case* and guidelines developed by the Organization.¹⁶⁸

The circumstances of a particular case may require a victim to be transitioned back to U.S. territory. Regulation 34(1) also prohibits anyone from restricting a ship's master in "taking or executing any decision which, in the master's professional judgment, is necessary for safety of life at sea and protection of the marine environment."¹⁶⁹ The MSC also adopted their own related guidelines for governments and shipmasters regarding their obligations under international law.¹⁷⁰ The obligation to render assistance should be complemented by the obligation of IMO member states to cooperate in the delivery of retrieved victims to a place of safety.¹⁷¹

Harm caused by a USCG air rescue attempt would be covered by the NATO SOFA.¹⁷² It covers issues that may arise from having military personnel deployed from one NATO member state into the territory of another. This includes claims from individuals for harm suffered,

¹⁶⁷ Maritime Safety Committee, Adoption of Amendments to the International Convention for the Safety of Life at Sea (SOLAS Convention), Annex 3, Res. MSC.153(78), 78/26/Add.1 (May 20, 2004). These changes were revised in 2004 and the obligations under Chapter V are regardless of the nationality or status of persons in distress.

¹⁶⁸ *Id.* (emphasis added). In these cases the relevant Contracting Governments shall arrange for such disembarkation to be effected as soon as reasonably practicable.

¹⁶⁹ *Id.* Nobody may restrict the ship's master, including the owner or operator.

¹⁷⁰ Maritime Safety Committee, Guidelines on the Treatment of Persons Rescued at Sea, Annex 3, Res. MSC.167(78), 78/26/Add.3 (May 20, 2004). The guidelines focus on the treatment of persons rescued at sea and the parties' humanitarian obligations.

¹⁷¹ *Id.*

¹⁷² NATO SOFA, *supra* note 160. The agreement, signed in Washington D.C. and entered into force in 1951, is applicable to all members of NATO.

arising out of the performance of official duties by the foreign military personnel.¹⁷³ Between the U.S. and Canada, the terms of this SOFA were further cemented by a 1952 agreement.¹⁷⁴ “Both the United States Government and the Canadian Government agree that uniform treatment of United States forces throughout Canada under the NATO Status of Forces Agreement would be in the interests of both countries and would make for simplification of administration.”¹⁷⁵

Article VIII of the NATO SOFA covers the procedure for handling claims for damage occurring in the receiving state. These claims are dealt with by the receiving state. “Claims shall be filed, considered and settled or adjudicated in accordance with the laws and regulations of the receiving State with respect to claims arising from the activities of its own armed forces.”¹⁷⁶ After claims are paid by the receiving state and the particulars of the case are sent to the sending state, the cost incurred is distributed between the contracting states:

- i. Where one sending state alone is responsible, the amount awarded or adjudged shall be distributed in the proportion of 25 percent chargeable to the receiving state and 75 percent chargeable to the sending state.
- ii. Where more than one state is responsible for the damage, the amount awarded or adjudged shall be distributed equally among them: however, if the receiving state is not one of the states responsible, its contribution shall be half that of each of the sending states.
- iii. Where the damage was caused by the armed services of the contracting parties and it is not possible to attribute it specifically to one or more of those armed services, the amount awarded or adjudged shall be distributed equally among the contracting parties concerned: however, if the receiving state is not one of the states by whose armed services the damage was caused, its contribution shall be half that of each of the sending states concerned.¹⁷⁷

¹⁷³ *Id.* Claims arising out of the performance of official duties in a foreign country where the U.S. is the sending State must be filed and processed under a SOFA, provided that the claimant is a proper party claimant under the SOFA.

¹⁷⁴ Agreement Relating to the Application of the NATO Status of Forces Agreement, Apr. 30, 1952, CTS 1952/14.5, U.N.T.S. No. 3308. This agreement, entered into force in 1953, was effected by exchange of notes in Washington D.C. between the Secretary of State and the Canadian Ambassador. It also applied to leased U.S. bases in Canadian territory.

¹⁷⁵ *Id.*

¹⁷⁶ NATO SOFA, *supra* note 160.

¹⁷⁷ *Id.* Reimbursements shall be made within the shortest possible time, in the currency of the receiving State.

While claims under the NATO SOFA would be dealt with by the Canadian Government, claims directly against the U.S. Government for a maritime tort occurring outside the U.S. may be brought under the Foreign Claims Act (FCA)¹⁷⁸ or Military Claims Act (MCA).¹⁷⁹ The FCA generally covers claims by non-Americans which do not fall under the authority of a SOFA. It provides compensation for personal injury, death, or property damage caused by, or incident to noncombat activities of U.S. military personnel.¹⁸⁰ It is unlikely this would often be used for claims arising from torts in Canadian territory, but it is possible that a claimant could have problems dealing with Canada's government in accordance with the SOFA. If the injured party is an inhabitant of the U.S., a claim can be settled under the MCA. The statutory language of the MCA is very similar to the FCA.

The Federal Tort Claims Act (FTCA)¹⁸¹ is generally used to sue the U.S. for non-maritime torts.¹⁸² This could be applicable to harm caused in Canadian waters that are not considered navigable. Section (b)(1) describes the circumstances under which the U.S. may be sued:

[The U.S. district courts] shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.¹⁸³

¹⁷⁸ Foreign Claims Act, 70A Stat. 154 (1956) (current version at 10 U.S.C.A. § 2734 (2006)). [hereinafter FCA].

¹⁷⁹ *Id.*

¹⁸⁰ Military Claims Act, 70A Stat. 153 (1956) (current version at 10 U.S.C.A. § 2733 (1996)). [hereinafter MCA].

¹⁸¹ Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1948). [hereinafter FTCA]. The FTCA permits private parties to sue the U.S. in a federal court for most torts committed by persons acting on behalf of the U.S. The FTCA constitutes a limited waiver of sovereign immunity in allowing the U.S. to be a defendant. It exempts claims based upon the failure to perform a discretionary function or duty. It also exempts a number of intentional torts.

¹⁸² *Id.*

¹⁸³ *Id.*

Maritime suits not applicable under the FTCA may be filed under the Public Vessels Act (PVA)¹⁸⁴ or the Suits in Admiralty Act (SIAA).¹⁸⁵ These are generally for torts occurring within the U.S. and its territorial waters. However, a plaintiff may be able to show that actions leading to their harm occurred in U.S. territory. Under the PVA, a plaintiff's lawsuit "may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States"¹⁸⁶ This does not just include harm physically caused by the ship itself. It has also been held to include cases where the negligence of personnel operating a public vessel is somehow responsible for causing harm to the victim.¹⁸⁷

Based on *U.S. v. Lawter*,¹⁸⁸ where a 1955 USCG helicopter rescue attempt ended badly, a plaintiff should be able to sue under the PVA for harm caused by conduct aboard a U.S. Government aircraft. Someone could also theoretically be injured by a USCG aircraft stemming from conduct aboard a U.S. Government vessel. Additionally, for non-American citizens, a waiver of sovereign immunity by the U.S. Government is required under the PVA. Therefore, the plaintiff's country of citizenship must have reciprocity with U.S. on similar claims.¹⁸⁹

There is no sovereign immunity waiver needed for non-citizens to sue the U.S. Government under the SIAA. This act provides that a lawsuit may be brought against the U.S. in

¹⁸⁴ Public Vessels Act, 46 App. U.S.C.A. § 781 (1925) (current version at 46 U.S.C. § 31101 (2006)). [hereinafter PVA]. The PVA was passed five years after the SIAA (*see* note 185) to cover U.S. Government vessels. It also includes compensation for towage and salvage services, including contract salvage, rendered to a public vessel.

¹⁸⁵ Suits in Admiralty Act, 46 App. U.S.C.A. §§ 741 et seq. (1920) (current version at 46 U.S.C. §§ 30901 et seq. (2010)). [hereinafter SIAA]. The SIAA was enacted 5 years before the PVA (*see* note 184) and originally applied only to ships employed as merchant vessels. A 1960 amendment allowed for all admiralty causes of action. Now the SIAA and PVA are very similar.

¹⁸⁶ PVA, *supra* note 184.

¹⁸⁷ *Taghadomi v. U.S.*, 401 F.3d 1080 (9th Cir. 2005). The court held that the plaintiffs' claim against the U.S. based on the USCG's allegedly negligent SAR operation fell within the scope of the PVA because the parties did not dispute that the USCG cutter involved in the operation was a public vessel within the meaning of the act.

¹⁸⁸ *U.S. v. Lawter*, 219 F.2d 559 (5th Cir. 1955). This was an action taken by the victim's husband under the PVA (*see* note 184) and FTCA (*see* note 181). The U.S. District Court for the Southern District of Florida gave judgment for the husband and the Government appealed. The Court of Appeals affirmed the ruling because there was sufficient evidence to support a finding that the Government was negligent.

¹⁸⁹ Tracy B. Farrell, *Liability of Coast Guard to Persons or Property While Engaged in Rescue Activities*, 11 A.L.R. FED. 2D 779 (2006).

a case where, had a private person or private vessel been involved instead of the USCG, a proceeding in admiralty could have been maintained.¹⁹⁰ Additionally, a tort claim falls within admiralty jurisdiction of U.S. federal courts when the tort occurs on or over navigable waters and the actions giving rise to the tort claim bear a significant relationship to traditional maritime activity.¹⁹¹ Because of the navigable waters requirement, a claim under the FTCA cannot be brought when the criteria for an SIAA suit is met.¹⁹²

A duty of reasonable care is placed on the USCG once it initiates a rescue operation. If reasonable care is not used and the victim is actually put in a worse position than if no rescue operation were attempted, the USCG can be held liable for its alleged negligent conduct. The Lawter case illustrates this precedent.¹⁹³ Here, the officer in charge of the helicopter allowed an untrained person to operate the air-sea rescue equipment and a woman they were attempting to rescue fell to her death.¹⁹⁴

While the USCG can be held liable for negligence while affirmatively performing rescue operations, there is no duty whatsoever to actually institute the operation in the first instance.¹⁹⁵ The duty in rescue situations is defined by the Good Samaritan Doctrine, which holds that the

¹⁹⁰ SIAA, *supra* note 185. This paper does not explore the topic of Admiralty Law in depth.

¹⁹¹ *Exec. Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249 (1972). The plaintiff brought suit for damages resulting from the crash-landing and sinking in the navigable waters of Lake Erie of their jet aircraft shortly after takeoff from a Cleveland airport. The plaintiff could not invoke federal admiralty jurisdiction in this case because air commerce is not a traditional marine activity.

¹⁹² *Kelly v. U.S.*, 531 F.2d 1144 (2d Cir. N.Y. 1976). The complaint was dismissed by the district court stating that the suit lacked subject matter jurisdiction since it was brought under the FTCA (*see* note 181), where it was exclusively cognizable under the SIAA (*see* note 185), and was barred by the two-year statutory limitation period. The appellate court affirmed the district court's decision and held that the claim should have been brought under the SIAA.

¹⁹³ *Lawter*, 219 F.2d 559, *supra* note 188.

¹⁹⁴ *Id.* at 559. In addition to the untrained man aboard the helicopter, there was another Coast Guardsman aboard helicopter who was trained to use the air-sea rescue equipment, but was not utilized.

¹⁹⁵ *Kettunen*, *supra* note 161. The USCG cannot be held liable with regard to its decision to undertake or abandon a rescue, but can only be held liable if, once having decided to undertake the rescue, it does not use reasonable care in carrying it out.

USCG has no legal duty to rescue persons or property.¹⁹⁶ It must be demonstrated that the actions actually placed the plaintiff in a worse position than had the USCG not acted at all. The case law is conclusive that the statutory duties do not place an affirmative obligation upon the USCG to act, even when the failure to act is unreasonable or negligent.¹⁹⁷

IV. CONCLUSION

We have seen major developments in SAR in the last thirty years. These issues affect the borders between the U.S. and Canada in the Great Lakes, as well as the Atlantic, Pacific, and Arctic regions. As the importance of national security continues to increase, a balance between concerns for sovereignty and concerns for lifesaving must be maintained.

The U.S. and Canada must continue to uphold strong agreements and coordination of both policies and operations between each other and between aeronautical and maritime SAR services. We want those in distress to feel assured that their lives will not be jeopardized by bureaucratic red tape or a potential rescuer's hesitation to enter another country's territory to fulfill their duty to render assistance.

¹⁹⁶ *Id.* The USCG must institute a rescue operation and act unreasonably to be held liable.

¹⁹⁷ *Daley v. U.S.*, 499 F. Supp. 1005 (D. Mass. 1980). The plaintiff sued the USCG, alleging negligence in delaying the start and its ultimate conduct of a search and rescue mission. The court held that there can be no liability placed on the USCG for its failure to start the active search earlier than it did, "whether that be thought reasonable or unreasonable under the circumstances."